

**McCarty & Son, Inc. and International Brotherhood
of Electrical Workers, Local 414. Case 4-CA-
13077**

27 February 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS

On 8 September 1983 Administrative Law Judge Bruce C. Nasdor issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McCarty & Son, Inc., Willow Street, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's conclusions, we find it unnecessary to rely on his application of the "small plant" doctrine to the facts of this case.

³ The judge properly ordered that the Respondent cease and desist from discouraging membership in the Union by laying off employees, but he failed to so note in his "Notice to Employees." Accordingly, we shall issue a notice that conforms with the Order.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

268 NLRB No. 162

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT question employees about their union activities and sentiments.

WE WILL NOT threaten employees with loss of employment if our employees select International Brotherhood of Electrical Workers, Local 414, or any other union, as their collective-bargaining representative.

WE WILL NOT promise to grant benefits to employees if our employees reject the Union as their collective-bargaining representative.

WE WILL NOT lay off employees or otherwise discriminate against them with respect to their hire or tenure of employment or any term or condition of employment in order to discourage membership in the Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Theodore Lehmier immediate and full reinstatement to his former position or to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and compensate him for any loss of pay suffered by reason of his termination, with interest.

WE WILL expunge from our files any reference to the discriminatory layoff of Theodore Lehmier, on 9 July 1982, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

All our employees are free to become, remain, or refrain from becoming members of International Brotherhood of Electrical Workers, Local 414, or any other union.

MCCARTY & SON, INC.

DECISION

BRUCE C. NASDOR, Administrative Law Judge: This case was tried at Lancaster, Pennsylvania, on April 14, 1983.

The complaint alleges that McCarty & Son, Inc. (the Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discriminatorily terminating an employee, Theodore Lehmier. It is further alleged that the Respondent independently engaged in 8(a)(1) violations of the Act by threats and interroga-

tion. At the hearing counsel for the General Counsel moved to amend the complaint to allege an additional count of interrogation and the motion to amend was granted. The Respondent, in its answer, denies each and every allegation.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in electrical construction work with its principal place of business located at 315 Carol Lynn Drive, Willow Street, Pennsylvania. During the past year, the Respondent, in the course of its business operations, purchased and received goods and materials valued in excess of \$50,000 from suppliers located within the Commonwealth of Pennsylvania, each of whom received said goods and materials directly from points outside the Commonwealth of Pennsylvania. The Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a Pennsylvania corporation engaged in electrical construction in the Lancaster, Pennsylvania area. Karl McCarty is the Respondent's president and Brian McCarty is its secretary and field supervisor.

On June 18, 1982,² Karl McCarty interviewed and hired Theodore Lehmier. Lehmier began working for the Respondent as a journeyman electrician on June 21. He worked at the Respondent's Kennett Square, Pennsylvania jobsite on the "CJ Clark" project. This job was located approximately an hour away from the Respondent's facility and Lehmier and his coworkers were transported back and forth from the jobsite each day by van. The van was driven by Harold Asper, the Respondent's job foreman on this project.

Soon after being hired, during the roundtrips to and from the job, Lehmier, who was familiar with the Union because his twin brother was a member, began to discuss, in the presence of Asper, the benefits of the Union. The discussions between Lehmier and his coworkers revolved around, inter alia, the pay scale, excessive overtime, general working conditions, the long drive to and from the job, and Brian McCarty's attitude.

On July 6, Lehmier called Lester Turner, the Union's business manager and financial secretary, and asked him if the Union would help in organizing the Respondent's employees, and they discussed the procedures for reach-

ing this end. Again, on July 7 and 8, they spoke about the possibility of Turner meeting with a group of employees on July 9. It was determined that Turner, Lehmier, and the employees would meet on Friday at approximately 5 p.m. rather than 7 p.m. because Turner had a prior commitment. Lehmier stated that he would have to confirm the time with his coworkers and he would get back to Turner. Lehmier then called all of the Respondent's employees except Jeff Holstein. Subsequently, he spoke to Turner, on July 8, and told him that he had confirmed the meeting with the other employees, and a 5:15 p.m. meeting on July 9 was acceptable.

On the evening of July 8, when Lehmier telephoned a coworker, Robert Diehl, to advise him of the union meeting to be held the next day, Diehl interrupted Lehmier and told him he had heard all about it from Harold Asper, the job foreman, and he wanted nothing to do with the Union. Diehl further advised Lehmier that he had called Brian McCarty and told him that Lehmier was organizing. Lehmier responded that he hoped Diehl would not screw up the union meeting just because he was not interested in the Union, that he should not leave the employees in a "jam." In his testimony, McCarty admitted that he spoke with Diehl on the evening of July 8 and that Diehl mentioned the rumor that the Union was trying to get in, and he may have mentioned Asper as having heard the same thing. McCarty denied that Lehmier's name was mentioned in the conversation.

Lehmier received a call from Brian McCarty approximately 20 minutes after his July 8 telephone conversation with Turner. McCarty told Lehmier that he was no longer needed on the Kennett Square project, that there was a job in Lancaster, and that he should report to the Respondent's shop the next morning.

On July 9 the next morning, Lehmier met Brian McCarty at the Respondent's shop and was informed by McCarty that he was laid off because the CJ Clark boilerhouse job had been completed. Lehmier stated that he wanted to know the real reason, to which McCarty responded there was a lack of work. He advised Lehmier that if work picked up he would call him back. Lehmier told Brian McCarty that when he was hired he was told by Karl McCarty that it was not company policy to lay off employees, and that it did not make sense to hire an employee and lay him off 3 weeks later. Lehmier testified that at his prehire interview with Karl McCarty, after discussing preliminaries, he asked McCarty about job security. McCarty allegedly replied that it was company policy not to lay off and that the Respondent had work scheduled for the entire year. Initially, Karl McCarty testified there was no discussion at all with respect to the subject of layoffs. Later in his testimony he admitted that he did tell Lehmier that it was company policy not to hire a lot of people and lay them off. He further testified that Lehmier did inquire as to how long the job would last and McCarty responded that it was not his intention to lay off an employee after a week or two of employment.

After being laid off, Lehmier called Turner and informed him of what had happened. Later that day, Turner met with Lehmier, Vincent Jones, and another of

¹ Counsel for the General Counsel's unopposed motion to correct the transcript is hereby granted.

² All dates are in 1982, unless otherwise specified.

the Respondent's employees at a fire hall and all three signed union authorization cards. Approximately 1 week later, Karl McCarty approached Jones in the shop and asked him whether he signed a card. Jones replied affirmatively, and McCarty responded that he was surprised that Jones did that.

Approximately 1 week after this conversation, Karl McCarty approached employee Robert Picciani at the jobsite and asked him how he felt about the Union. After Picciani responded that he was unsure as to his feelings, McCarty responded that, if Picciani worked "in the union," he would be working "for the local 414 union hall," not a contractor, and that McCarty could simply call the hall for a different employee rather than Picciani if he so desired. He also told Picciani that if he stayed nonunion McCarty could make it better for him as far as a raise in pay.

On July 8, a meeting was held at the jobsite between Brian McCarty and the employees. A discussion ensued concerning Respondent's dress code and policy of paying the men for 1 hour travel time to the jobsite. Lehmier did not approve of the Respondent's policies and expressed his displeasure, using curse words during the course of his expression. Asper, the job foreman, testified that the language used by Lehmier at the meeting was typical of that used by other men on the job. At this meeting McCarty distributed to the employees, including Lehmier, keys to the toolboxes, shop building, and trucks. After handing out the keys, McCarty recorded in a notebook the days that the employees, including Lehmier, planned to take off for vacation. It is unrefuted that Lehmier was asked by McCarty which days he wanted for vacation and, when he responded, McCarty recorded same in his notebook.

It is uncontroverted that, shortly after he was hired, Lehmier telephoned Karl McCarty at his home and complained about working conditions.

Conclusion and Analysis

It is undisputed that Lehmier was the principal mover for union representation among the employees. His union support was open with no effort made to hide his feelings from either his coworkers or management.

Although hearsay, there is record testimony by Lehmier that Diehl told Brian McCarty about the union campaign and Lehmier's involvement. McCarty admits the conversation but denies that any names were mentioned. Diehl did not testify. I do not believe that Diehl and McCarty discussed the Union's organizational campaign on July 8, the night preceding Lehmier's termination, without Lehmier's name being mentioned.

Asper was also aware of the union activity among the Respondent's employees. It was part of his job to keep management apprised of developments, particularly employee complaints which he could not settle. He arranged the July 8 meeting between McCarty and the employees.

The timing of the layoff is more than highly suspicious, particularly when the Respondent learned of the union activity the prior evening.

Another factor to be considered is Lehmier's complaints about working conditions almost immediately after commencing his employment.

Only the day before the layoff, Lehmier was handed keys to the toolbox, shop, and truck. His vacation desires were also solicited and recorded.

The thread of Lehmier's "attitude" regarding working conditions and company policy runs throughout Respondent's defense. These factors occasioned McCarty to have a witness, a secretary, present when he informed Lehmier of his layoff.

Respondent had only nine employees in July. Even if these other factors were not present, knowledge would be inferred by virtue of the "small plant" doctrine.

Although subsequently, some months later, several employees were laid off, the Respondent was unable to explain to my satisfaction why it bothered to hire Lehmier on June 21, only to lay him off 3 weeks later.

Moreover, the preponderance of the evidence discloses that work was available for Lehmier. Brian McCarty actually told him there was work in the Lancaster area.

In my view the Respondent's economic defense is a pretext, and the real reason for the layoff of Lehmier was his union activity. The Respondent's shifting defense, insubordination, is equally specious. McCarty never confronted Lehmier with his insubordination at the exit interview or during the July 8 conversation. Record testimony discloses that profanity among the employees was commonplace.

Lehmier impressed me as a credible witness whose demeanor evidenced an assuredness. He was articulate and in my view made an honest effort to be scrupulous in his testimony.

By way of contrast, Brian and Karl McCarty were evasive and tended to distort. Accordingly I discredited them.

I conclude that the Respondent's true motivation for laying off Lehmier was union animus, thus the layoff was in violation of Section 8(a)(1) and (3) of the Act.

The interrogation of Vincent Jones stands unrefuted on this record. Accordingly by engaging in said conduct, Respondent violated Section 8(a)(1) of the Act.

I also find that Karl McCarty, by questioning Picciani as to how he felt about the Union, by implying that unionization would result in the loss of job opportunities, and by promising improved wages and benefits if he stayed nonunion McCarty violated Section 8(a)(1) of the Act. Jones was similarly unlawfully interrogated in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating an employee as to his union sentiments, Respondent engaged in a violation of Section 8(a)(1) of the Act.

4. By interrogating an employee with respect to his union sympathies, threatening said employee with loss of

employment if its employees selected the Union as their collective-bargaining representative, and promising to grant benefits to said employee if he rejected the Union as his collective-bargaining representative, the Respondent engaged in conduct in violation of Section 8(a)(1) of the Act.

5. The Respondent discriminatorily laid off Theodore Lehmier in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily laid off Theodore Lehmier, I recommend that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. In addition I recommend that the Respondent make Lehmier whole for any loss he may have suffered by reason of the discrimination against him, by payment to him, a sum of money equal to that which he would normally have earned from the date of his discharge, less net earnings during said period. Backpay shall be computed according to *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). (See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER³

The Respondent, McCarty and Son, Inc., Willow Street, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and sympathies.

(b) Threatening employees with loss of employment if the Respondent's employees select the Union as their collective-bargaining representative.

(c) Promising to grant benefits to employees if they rejected the Union as their collective-bargaining representative.

(d) Discouraging membership in the Union by laying off employees or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of employment or engaging in protected concerted activity or union activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Theodore Lehmier immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to any seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him with interest as provided in the section above entitled "The Remedy."

(b) Post at its premises at Willow Street, Pennsylvania, copies of the notice marked "Appendix."⁴ Copies of said notice on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon reasonable request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary to ascertain and compute the amount, if any, of backpay due under the terms of this Order.

(d) Notify the Regional Director for Region 4 in writing within 20 days from the date of this Order what steps have been taken to comply.

(e) Expunge from its files any reference to the discriminatory layoff of Theodore Lehmier, on July 9, 1982, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."